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NO. 80-644

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

G. D. SEARLE & COMPANY,

Petitioner,

v.

SUSAN COHN and WALTER COHN,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX

RAYMOND M. TIERNEY, JR.
SHANLEY & FISHER
550 Broad Street
Newark, New Jersey 07102
(201) 643-1220
Counsel for Petitioner

WALTER R. COHN
15 Valley Street
South Orange New Jersey 07079
(201) 762-6444
Counsel for Respondents

PETITION FOR CERTIORARI FILED OCTOBER 20, 1980.
CERTIORARI GRANTED APRIL 20, 1981

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The following opinion has been omitted in printing this appendix because it appears on the following page in the appendix to the printed petition for Certiorari:

Opinion of the Court of Appeals for the Second Circuit, dated July 28, 1980, and reported at 628 F.2d 801 ..... A1

JOINT APPENDIX

Chronological List of Relevant Docket Entries

January 29, 1974 —Plaintiffs' Complaint filed in the New Jersey Superior Court, Law Division, Essex County.

March 14, 1974 —Defendant's answer filed.

April 1, 1974 —Petition for Removal, Removal Bond and Notice of Removal filed in the United States District Court for the District of New Jersey.

July 15, 1975 —Depositions of plaintiffs Walter and Susan Cohn taken July 25, 1974, filed.

July 18, 1975 —Defendant's Notice of Motion for summary judgment filed.

September 8, 1975 —Hearing on defendant's motion for summary judgment.

March 22, 1978 —District Court opinion, holding that N.J.S.A. 2A:14-22 is unconstitutional, filed. (The opinion is published at 447 F.Supp. 903).

November 20, 1978—Defendant's Notice of Motion to schedule a hearing on the issue of whether plaintiffs are entitled to claim the benefit of the "discovery rule."

February 12, 1979 —Evidentiary hearing held on discovery rule issue.

Chronological List of Relevant Docket Entries

July 26, 1979 —District Court opinion granting defendant's motion for summary judgment filed.

August 6, 1979 —Order entered granting summary judgment in favor of defendant.

August 29, 1979 —District Court opinion and Order denying plaintiffs' motion to set aside the judgment.

August 29, 1979 —Plaintiff's motion for a new trial filed.

September 14, 1979—Plaintiff's Notice of Appeal filed.

October 18, 1979 —Order entered granting defendant's application for leave to file a cross appeal.

July 23, 1980 —Opinion and Judgment of the Court of Appeals for the Third Circuit.

Plaintiffs' Complaint, Filed January 29, 1974 in New Jersey Superior Court, Law Division

SUPERIOR COURT OF NEW JERSEY
ESSEX COUNTY—LAW DIVISION
DOCKET NO. L15857-73
CIVIL ACTION

SUSAN COHN and WALTER R. COHN, her husband,
Plaintiff,

vs.

G.D. SEARLE & COMPANY,
Defendant.

Plaintiffs, Susan Cohn and Walter R. Cohn, residing at 972 Broad Street, in the City of Newark, County of Essex and State of New Jersey, complaining of Defendant says:

FIRST COUNT

1. The defendant is in the business of and manufactured, produced and sold an oral contraceptive pill known as "Enovid."

2. The said defendant G.D. Searle & Company, sold and distributed the said drug under the trade name of "Enovid" for the purpose and use as a birth control measure.

Plaintiffs' Complaint Filed January 29, 1974 in New Jersey Superior Court, Law Division

3. In the Spring of 1963, the plaintiff, Susan Cohn, did take and use the contraceptive pill known as "Enovid."

4. That as a result of the taking of the said contraceptive pill "Enovid" the plaintiff, Susan Cohn, was rendered seriously, grievously and permanently injured; that she required and will require extensive hospital and other medical care and attention; that she was and is incapacitated from attending her usual duties.

5. The negligence of the defendant G.D. Searle & Company, its servants, agents and/or employees, consisted of manufacturing, selling and distributing the aforesaid contraceptive pill "Enovid" without making proper and sufficient tests to determine the dangers and contraindications thereof; in failing to adequately warn the public and medical profession of the dangers and contraindications and side effects in the use of the aforesaid drug; in failing to properly inspect the aforesaid drug; in advertising and recommending the use of the aforesaid drug without sufficient knowledge as to its dangerous propensities; in failing to properly advertise the aforesaid drug to the public and medical profession; in representing that the aforesaid drug was safe for use for contraceptive and therapeutic purposes, when in fact said drug was unsafe for such use; that the said defendant had not conducted a sufficient testing program to determine whether or not the aforesaid drug was safe for use; that the defendant knew or should have known, in the exercise of reasonable diligence that said drug was unsafe and unfit for use by reason of their dangerous side effects, contraindications and insufficient testing; and that the said defendant was other-

Plaintiffs' Complaint Filed January 29, 1974 in New Jersey Superior Court, Law Division

wise negligent and careless in the premises; the said defendant produced a drug which was not of a merchantable quality and not fit for the particular use as prescribed said use being warranted as to its merchantability and quality by the producer.

WHEREFORE, Judgment will be claimed against the defendant for damages and costs of suit.

SECOND COUNT

1. The plaintiff repeats each and every allegation contained in the First Count as though fully set forth at length herein.

2. The said defendant herein represented and warranted that the aforesaid drug sold under the trade name of "Enovid" was safe and fit for use as a birth control and therapeutic drug; that it was of merchantable quality and did not produce any side effects dangerous to life and limb.

3. That in fact the aforesaid representations and warranties were false and untrue in that the said "Enovid" was not safe or fit for use as a birth control or therapeutic drug; that it was not of merchantable quality and in fact produced serious side effects and that it was contraindicated for certain people and was otherwise dangerous and unsafe.

4. That as a result of the aforementioned breach of warranty and breach of its representations, the plaintiff suffered serious and permanent damages.

Plaintiffs' Complaint Filed January 29, 1974 in New Jersey Superior Court, Law Division

WHEREFORE, Judgment will be claimed against the defendant for damages and costs of suit.

THIRD COUNT

1. The plaintiff repeats the allegations contained in the First Count and the Second Count as though fully set forth at length herein.

2. That by reason of the foregoing, the defendant G.D. Searle & Company, has violated statutes, codes, laws, ordinances and is liable to the plaintiff herein by reason of such statutory violations.

3. That by reason of the foregoing the plaintiff has been damaged and suffered severe and permanent injuries.

WHEREFORE, Judgment will be claimed against the defendant for damages and costs of suit.

FOURTH COUNT

1. Plaintiff repeats the allegations contained in the First, Second and Third Counts as though fully set forth at length herein.

2. That by reason of the foregoing, the defendant, G.D. Searle & Company, is liable to the plaintiff herein under the Doctrine of Strict Liability.

3. By reason of the foregoing, the plaintiff has sustained damages and suffered severe and permanent injuries.

Plaintiffs' Complaint Filed January 29, 1974 in New Jersey Superior Court, Law Division

WHEREFORE, Judgment will be claimed against the defendant for damages and costs of suit.

FIFTH COUNT

1. Plaintiff, Walter R. Cohn, was and still is the husband of the plaintiff, Susan Cohn.

2. That the said plaintiff, Walter R. Cohn, repeats all the allegations contained in the First, Second, Third and Fourth Counts as though fully set forth at length herein.

3. By reason of and as a result of the foregoing, the said plaintiff, Walter R. Cohn, was and is deprived of the services, society, consortium and companionship of the plaintiff Susan Cohn, and was caused to expend various and divers sums of money in an effort to cure the plaintiff, Susan Cohn, of her injuries and will be required to expend further sums of money in the future for said cure for the plaintiff, Susan Cohn, and this plaintiff was otherwise damaged.

WHEREFORE, Judgment will be claimed against the defendant for damages and costs of suit.

WALTER R. COHN
Attorney for Plaintiff and Pro Se

Defendant's Answer, Filed March 14, 1974 in New Jersey Superior Court, Law Division

[Caption Omitted in Printing]

The defendant, G. D. Searle & Co., by its attorneys, Shanley & Fisher, Esqs., answers the Complaint and says:

First Count

1. The defendant admits the allegations contained in paragraphs 1 and 2 of the First Count.

2. The defendant is presently without knowledge or information sufficient to form a belief as to the truth of the allegation contained in paragraph 3 of the First Count.

3. The defendant denies the allegations contained in paragraphs 4 and 5 of the First Count.

Second Count

1. The defendant repeats and reiterates its answers to the allegations contained in the First Count as if the same were set forth at length herein.

2. The allegations contained in paragraph 2 of the Second Count are legal conclusions and, as such, are denied by the defendant.

3. The defendant denies the allegations contained in paragraphs 3 and 4 of the Second Count.

Defendant's Answer, Filed March 14, 1974 in New Jersey Superior Court, Law Division

THIRD COUNT

1. The defendant repeats and reiterates its answers to the allegations contained in the First and Second Counts as if the same were set forth at length herein.

2. The defendant denies the allegations contained in paragraphs 2 and 3 of the Third Count.

FOURTH COUNT

1. The defendant repeats and reiterates its answers to the allegations contained in the First, Second and Third Counts as if the same were set forth at length herein.

2. The defendant denies the allegations contained in paragraphs 2 and 3 of the Fourth Count.

FIFTH COUNT

1. The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the Fifth Count.

2. The defendant repeats and reiterates its answers to the allegations contained in the First, Second, Third and Fourth Counts as if the same were set forth at length herein.

3. The defendant denies the allegations contained in paragraph 3 of the Fifth Count.

Defendant's Answer, Filed March 14, 1974 in New Jersey Superior Court, Law Division

FIRST SEPARATE DEFENSE

The claim set forth in the Complaint is barred by the Revised Statutes of the State of New Jersey, more particularly, the Statute of Limitations, as said suit was not filed within the time period allowed by said statute.

SECOND SEPARATE DEFENSE

Any injury or damage which the plaintiff may have sustained was due to the act or acts of a third person or persons over whom the defendant had no control.

THIRD SEPARATE DEFENSE

Defendant, G. D. Searle & Co., violated no duty which may have owed to the plaintiffs.

FOURTH SEPARATE DEFENSE

Defendant, G. D. Searle & Co., denies that it breached any expressed or implied warranty.

FIFTH SEPARATE DEFENSE

Service of process was improper as provided, and as such this Court has no jurisdiction over defendant, G. D. Searle & Co.

Defendant's Answer, Filed March 14, 1974 in New Jersey Superior Court, Law Division

Sixth Separate Defense

Defendant, G. D. Searle & Co., further states that the product Enovid was and has been formulated, tested, manufactured, processed and labeled by the defendant, G. D. Searle & Co., in accordance with the provisions of the Federal Food, Drug and Cosmetic Act and regulations promulgated pursuant thereto.

Seventh Separate Defense

Defendant, G. D. Searle & Co., further states that the female plaintiff had a significant premonitory medical history which is the causative fact for her alleged illness, and it occurred only coincidentally, if at all, with her alleged use of Enovid.

Eighth Separate Defense

Defendant, G. D. Searle & Co., further states that the female plaintiff's alleged injury is wholly unrelated to her alleged use of Enovid, or that the alleged injury resulted from acts or occurrences for which this defendant is not liable or responsible.

Jury Demand

The defendant, G. D. Searle & Co., demands a trial by a jury of twelve (12) on all the issues involved herein.

Defendant's Answer, Filed March 14, 1974 in New Jersey Superior Court, Law Division

DEMAND FOR STATEMENT OF DAMAGES

The defendant, G. D. Searle & Co., demands a written statement of damages, within five (5) days, as provided by the Rules of Court.

SHANLEY & FISHER
Attorneys for Defendant
G. D. Searle & Co.
By /s/ RAYMOND M. TIERNEY, JR.

Defendant's Notice of Motion for Summary Judgment, Filed July 18, 1976 in the United States District Court

[Caption Omitted in Printing]

Sirs:

Please take notice that on the 8th day of September, 1975, at 10:00 a.m. in the forenoon or as soon thereafter as counsel may be heard, the undersigned, attorneys for defendant, G. D. Searle & Co., will move before the Honorable H. Curtis Meanor, Judge of the United States District Court for the District of New Jersey, at the Court House and Post Office Building in Newark, New Jersey, for an order granting said defendant summary judgment and dismissing the complaint, with prejudice, on the grounds that this action is barred by the applicable Statute of Limitations, 2A N.J.S.A. 14-2.

Please take further notice that reliance will be placed upon the brief annexed hereto, the depositions conducted in this action and the plaintiffs' answer to interrogatories.

Shanley & Fisher
Attorneys for Defendant
By Raymond M. Tierney, Jr.

Excerpts from *Plaintiffs' (First) Brief*, Submitted to the United States District Court

• • • Both plaintiffs Cohn, had become aware in or around 1970, that there was a possible connection between the taking of the "Enovid" and the C.V.A. However, plaintiff, Walter Cohn, as an Attorney, was not prepared at that point to bring suit on mere speculation. Both plaintiffs Cohn, diligently endeavored to establish a concrete casual link between "Enovid" and the C.V.A. of Susan Cohn. It was not until late 1973 however that plaintiff Walter Cohn, in his position as an Attorney, became convinced that the information that he had amassed, along with medical opinions of doctors, amounted to concrete evidence linking the taking of the "Enovid" to plaintiff Susan Cohn's C.V.A.

The *Lopez* Court noted that in certain situations it may be unjust to hold liability long after the alleged injury has occurred, as years of fading memories and lost witnesses may severely prejudice a defendant. (at 62 N.J. 275). Such is indeed not the instant case. The evidence linking "Enovid" to the C.V.A. of Mrs. Cohn, has only quite recently come to light. The *Lopez* Court at 276, mandated that:

> ". . . All relevant facts and circumstances, should be considered. The determinative factors may include but need not be limited to, the nature of the alleged injury, the availability of witnesses and written evidence, the length of time that has elapsed since the alleged wrongdoing, whether the delay has been to any extent deliberate or intentional, whether the delay may be said to have peculiarly or unusually prejudiced the defendant. The burden of proof will rest upon the party claiming the indulgence of the rule." (Footnote omitted)

Excerpts from Plaintiffs' (First) Brief, Submitted to the United States District Court

The instant situation is completely within the guidelines of the *Lopez* Court decision. The CVA of plaintiff, Susan Cohn, occurred at a time when she was in otherwise perfect health. The seriousness of her injuries could not very well have been attributed to the "Enovid" without concrete evidence. It was not until the latter portion of 1973 however that the medical evidence linking "Enovid" to the occurrence of CVA's came to light. Following the strength of this evidence, suit was filed with dispatch. The delay in filing suit from the time of the CVA was due solely to the lack of concrete evidence, and not due to any kind of concealment of evidence by the plaintiffs. Any delay in starting suit cannot be said to prejudice the defendant in any manner. Had defendant exercised greater care, and had defendant disclosed information known to it to both the public and the medical profession, regarding the possible hazardous effects of its "Enovid" product, and been more diligent in its testing procedures, it is possible plaintiffs could have discovered the cause of Susan Cohn's CVA prior to the latter portion of 1973. However due to the lack of definitive research and definitive medical opinion prior to the latter portion of 1973 it was not possible for the plaintiff to bring suit against defendant Searle on anything more than conjecture and weak opinion.

Excerpts from *Plaintiffs' (Third) Brief* Submitted to the United States District Court

Legal Argument

Point I

Where Plaintiff's Discovery of a Causal Connection Between Injury and Fault Pre-Dates or Coincides With Plaintiff's Disability as that Term is Used in N.J.S.A. 2A:14-21), the Statute of Limitations is Tolled Until Such Time as the Disability is Removed.

Plaintiffs allege that Susan Cohn's use of the drug manufactured by Defendant was the cause of her injury which resulted in the cerebral vascular accident (C.V.A.) and subsequent paralysis of her left side, arm and leg. Plaintiffs contend that there exists a causal connection between the injury sustained and the ingestion of Defendant's drug, and that the date of the discovery of the causal connection was during the last months of 1969. The C.V.A. occurred on December 22, 1963. The Complaint was filed January 29, 1974, clearly over two years after the injury. Notwithstanding the dictates of N.J.S.A. 2A:14-2, which prescribes the two year limitation for commencement of negligence actions. Plaintiffs argue that this Court should invoke the equitable discovery rule enunciated in *Lopez* v. *Swyer*, 62 N.J. 267, 300 A.2d 563 (1973) and its progeny.

The rule is now well settled in New Jersey that the two-year Statute of Limitations on a medical malpractice action

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• • •

> Now it was not until the latter part of 1973 that I was able to talk to her about it. And she did give me consent to file the lawsuit at that time."
>
> (Transcript from Hearing Before Trial, February 12, 1979, Page 58, Line 1.)

Excerpts from Plaintiffs' (Third) Brief Submitted to the United States District Court

For the purposes of this Brief, Plaintiffs' assume this Court will accept the contention that discovery occurred in 1969-1970. The issue then crystalizes into whether or not Plaintiffs' suit should be barred for failure to bring the lawsuit within two years of the date of discovery.

Plaintiffs allege that on or about the date of discovery, Susan Cohn was suffering from a severe depression. As a direct consequence of her depression she was undergoing classical symptoms of denial of her illness (See testimony of Walter R. Cohn, February 12, 1979, p. 69), which was characterized by an adamant hostility toward any discussion of the events surrounding it. At that time, her state of mind was one of severe depression, as evidenced by the reports of her doctors which are in Evidence.

Plaintiffs contend that Susan Cohn's state of mind constitutes a disability which should serve to toll the statute of limitations. Reliance is placed upon *Kyle* v. *Green Acres at Verona, Inc.*, 44 N.J. 100, 207 A.2d 513 (1965). In *Kyle* the Plaintiff fell on Defendant's icy sidewalk and sustained a fractured hip. After release from hospitalization for her hip injury she was admitted to a nursing home. From there

• • •

State by State Analysis of Law, Submitted by Defendant at Request of United States District Court

APPENDIX

Pursuant to the trial court's request, defendant submitted a state by state analysis of the effect of an absent defendant's continued amenability to service of process upon a state's tolling provision. The states which follow the majority position, that a statute of limitations is not tolled by the defendant's absence when the defendant remains amenable to service of process, are:

ALABAMA:

Peters v. *Tuell Dairy Co.*, 250 Ala. 600, 35 So.2d 344 (1948); *Dedmon* v. *Falls Products, Inc.*, 299 F.2d 173 (5th Cir 1962).

ALASKA:

Byrne v. *Ogle*, 488 P. 2d 716 (Ala. 1971).

ARIZONA:

Phillips v. *Anchor Hocking Glass Corp.*, 100 Ariz. 251, 413 P.2d 732 (1966); *Hawkinson Tire Co.* v. *Paul E. Hawkinson Co.*, 13 Ariz. App. 343, 476 P.2d 864, *aff'd.*, 107 Ariz. 255, 485 P.2d 825 (1970); *Selby* v. *Kurman*, 110 Ariz. 522, 521 P.2d 609 (1974).

CALIFORNIA:

Bigelow v. *Smik*, 6 C.A. 3d 10, 85 Cal. Rptr. 613 (1970); *Raynolds* v. *Volkswagenwerk Aktiengesellschaft*, 275 C.A. 2d 997, 80 Cal. Rptr. 610 (1969); *Rios* v. *Torvald Klaveness*, 2 C.A. 3d 1077, 83 Cal. Rptr. 150 (1969).

State by State Analysis of Law, Submitted by Defendant at Request of United States District Court

COLORADO:

Norton v. *Dartmouth Skiis, Inc.*, 147 Col. 436, 364 P.2d 866 (1961) (where the Court held that a foreign, non-resident corporation that was not registered to do business in Colorado was nevertheless *present* because of its salesmen in the state and could successfully plead the statute of limitations).

CONNECTICUT:

Coombs v. *Darling*, 116 Conn. 643, 166 A.70 (1933); *Kilburn* v. *Keenan*, 27 Conn. Sup. 394, 240 A.2d 213 (1967).

DELAWARE:

Hurwitch v. *Adams*, 52 Del. 13, 151 A.2d 286 *aff'd.*, 52 Del. 247, 155 A.2d 591 (1959).

FLORIDA:

Friday v. *Newman*, 183 So.2d 25 (Fla. App. 1966); *cert. dism.* 189 Co. 2d 629 (Fla. (1967).

GEORGIA:

Railey v. *State Farm Mutual Auto. Ins.*, 129 Ga. App. 875, 201 S.E. 2d 628 (1973).

IDAHO:

Lipe v. *Javelin Tire Co., Inc.*, 96 Idaho 723, 536 P.2d 291 (1975).

State by State Analysis of Law, Submitted by Defendant at Request of United States District Court

ILLINOIS:

Nelson v. *Richardson*, 295 Ill. App. 504, 15 N.E.2d 17 (1938); *Rivera* v. *Taylor*, 61 Ill. 2d 406, 336, N.E.2d 481 (Ill. 1975).

INDIANA:

American States Insurance Co. v. *Williams*, 29 Ind. Dec. 135, 278 N.E. 2d 295 (1972).

IOWA:

Rorenge v. *Holthaus*, 243 Iowa 571, 52 N.W. 2d 711 (1952); *Fulmer* v. *Debel*, 216 N.W. 2d 789 (Iowa 1974).

KANSAS:

Bond v. *Golden*, 273 F.2d 265 (10th Cir. 1959).

MARYLAND:

Jolivet v. *Elkins*, 386 F. Supp. 261 (D. Md. 1974) (where the district court indicated that since the defendant individuals were subject to long-arm service, the tolling statute would not apply).

MASSACHUSETTS:

Walsh v. *Ogorzalek*, 361 N.E. 2d 1247 (Mass. 1977)

MICHIGAN:

Hammell v. *Bettison*, 362 Mich. 396, 107 N.W. 2d 887 (1961); *Melville* v. *Kelleher*, 22 Mich. App. 251, 177 N.W. 2d 238 (1970);

State by State Analysis of Law, Submitted by Defendant at Request of United States District Court

MINNESOTA:

Long v. *Moore,* 295 Minn. 266, 204 N.W. 2d. 641 (1973).

MISSISSIPPI:

Dent v. *Jones & Pintard,* 50 Miss. 265 (1874) ("if process can be served, absence should not be deducted to save the bar of the statute.")

MISSOURI:

Haver v. *Basset,* 287 S.W.2d 342 (Mo. App. 1956).

MONTANA:

Baker v. *Ferguson Research Inc.,* 61 F.R.D. 637 (D. Mont. 1974).

NEBRASKA:

Gatliff v. *Little Audrey's Transportation Co., Inc.,* 317 F. Supp. 1117 (D. Neb. 1970).

NEVADA:

Cal-Farm Insurance Co. v. *Oliver,* 78 Nev. 479, 375 P.2d 857 (1962); *Blotzke* v *Christmas Tree, Inc.,* 88 Nev. 449, 499 P.2d 647 (1972).

NEW HAMPSHIRE:

Bolduc v. *Richards,* 101 N.H. 303, 142 A.2d 156 (1958); *Hatch* v. *Hooper,* 101 N.H. 214, 138 A.2d 671 (1958).

State by State Analysis of Law, Submitted by Defendant at Request of United States District Court

NEW MEXICO:

Benally v. *Pigman*, 78 N.M. 189, 429 P.2d 648 (1967).

NEW YORK:

Yarusso v. *Arbotowicz*, 41 N.Y.2d 516, 362 N.E.2d 600 (1977).

NORTH CAROLINA:

Volivar v. *Richmond Cedar Works*, 152 N.C. 656, 68 S.E. 200 (1910) (if a personal judgment can be obtained against a foreign corporation then such corporation is not equal to a non-resident); *Smith* v. *Finance Co. of America*, 207 N.C. 367, 177 S.E. 183 (1934) (where a non-resident, foreign corporation not registered to do business was effectively served by service upon the Secretary of State, the tolling provision was in inapplicable). Check 224 S.E. 243, 2d 226 S.E. 513; 221 S.E. 2d 895.

OHIO:

Partis v. *Miller Equipment Co.*, 324 F. Supp. 898 (N.D. Ohio 1970), *aff'd.*, 439 F.2d 262 (6th Cir. 1971).

OKLAHOMA:

Walker v. *L.E. Meyers Construction Co.*, 175 Okla. 548, 53 P.2d 547 (1938); *Jarchow* v. *Eder*, 433 P. 2 942 (Okla. 1967).

OREGON:

Whittington v. *Davis*, 221 Or. 209, 350 P.2d 913 (1960); *Winters* v. *Jacobsen*, 221 Or. 214, 350 P.2d 1078 (1960).

State by State Analysis of Law, Submitted by Defendant at Request of United States District Court

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State by State Analysis of Law, Submitted by Defendant at Request of United States District Court

PENNSYLVANIA:

Will v. *Malosky*, 432 Pa. 240, 247 A.2d 788 (1968).

SOUTH DAKOTA:

Busby v. *Shafer*, 75 S.D. 428, 66 N.W. 2d 910 (1954).

TENNESSEE:

Arrowood v. *McMinn County*, 173 Tenn. 562, 121 S.W. 2d 566 (1938); *Young* v. *Hicks*, 250 F.2d 80 (8th Cir. 1957).

UTAH:

Snyder v. *Clune*, 15 Utah 2d 254, 390 P.2d 915 (1964).

VERMONT:

Reed v. *Rosenfield*, 115 Vt. 76, 51 A.2d 189 (1974); *Law's Admir.* v. *Culver*, 120 Vt. 285, 155 A.2d 885 (1959).

VIRGINIA:

Bergman v. *Turpin*, 206 Va. 539, 145 S.E.2d 135 (1965).

WASHINGTON:

Smith v. *Forty Million, Inc.*, 64 Wash. 2d 912, 395 P.2d 201 (1964); *Summerrise* v. *Stephens*, 75 Wash. 2d 808, 454 P.2d 224 (1969).

WEST VIRGINIA:

Kisner v. *Fiori*, 151 W.Va. 850, 157 S.E.2d 238 (1967) (where the Court in determining whether the state

State by State Analysis of Law, Submitted by Defendant at Request of United States District Court

Non-resident Motorist Statute applied prospectively assumed that had it so applied the tolling statute would not have been applicable to the nonresident, individual who had an automobile accident within the state.).

WISCONSIN:

Wisc. Stat. Ann. §893.30 (1969) effectively overruled the old case of *Bode* v. *Flynn,* 213 Wis. 509, 252 N.W. 284 (1934).

WYOMING:

Tarter v. *Insco,* 550 P.2d 905 (Wyo. 1976)

Only four states continue to adhere to the view that where a nonresident defendant individual is amenable to service of process such defendant may not plead the bar of the statute of limitations. These states are:

NEW JERSEY:

Lemke v. *Bailey,* 41 N.J. 295, 196 A.2d 523 (1963).

OHIO:

Couts v. *Rose,* 152 Ohio St. 458, 90 N.E.2d 139 (1950). However, the Ohio courts have taken a different approach to corporations. See *Partis* v. *Miller Equipment Co., supra.*

SOUTH CAROLINA:

Macri v. *Flaherty,* 115 F. Supp. 739 (E.D.S.C. 1953).

State by State Analysis of Law, Submitted by Defendant at Request of United States District Court

TEXAS:

Dietz v. *Vaughn*, 423 S.W. 2d 113 (Civ. App. 1967), *aff'd.*, 403 S.W. 2d 487 (Tex. 1968).

Of the remaining states and the District of Columbia in which tolling statutes are in effect, the statutes in force in the District of Columbia, and Kentucky are inapplicable to nonresidents. Those states' statutes only apply to defendants who are residents at the time the cause of action accrues and subsequently leave the state or conceal themselves within it. The Arkansas provision specifically provides that "[T]his act and all other acts of limitations shall apply to non-residents, as well as to residents of this State." *Ark. Stat. Ann.* §37-230. In the following states there exist tolling statutes, but either no or insufficient case law exists to adequately determine how these states would construe their tolling statutes: Hawaii, Maine, North Dakota, and Rhode Island. We could find no statute or case dealing with the subject at hand from Louisiana.

First Opinion of the United States District Court for the District of New Jersey, Filed March 22, 1978

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

CIVIL ACTION No. 74-450

SUSAN COHN and WALTER COHN, her husband,

Plaintiffs,

v.

G. D. SEARLE & COMPANY,

Defendant.

Appearances:

Walter R. Cohn, Esq.
Attorney for Plaintiffs.

Shanley & Fisher, Esqs.
Attorneys for Defendant.
BY: Raymond M. Tierney, Jr., Esq.
Robert L. Dughi, Esq.

MEANOR, District Judge.

This matter comes before the court on defendant's motion for summary judgment. For reasons stated hereinafter, the issues presented by this motion will be treated

in two stages. This first opinion is addressed to the question whether the defendant is entitled to the benefit of the statute of limitations. The resolution of the issue turns on the construction and application of the New Jersey tolling statute to a foreign unlicensed corporate defendant which, from the time of the occurrence of the injury alleged in the instant complaint, had no formal presence within New Jersey yet remained amenable to long-arm service.

If it is determined that the defendant has available to it the defense of the statute of limitations, then it will be necessary to decide whether the plaintiffs are entitled to the "discovery" exception to strict application of the statute.

Plaintiffs Susan and Walter Cohn have brought this suit against G. D. Searle & Co. (hereinafter "Searle"), the manufacturer of the oral contraceptive Enovid, for personal injury and per quod damages allegedly resulting from Mrs. Cohn's use of the drug. Mrs. Cohn commenced taking the contraceptive in the spring of 1963 and continued its use until December 22, 1964. On that date she suffered a stroke, or cerebral vascular accident (C.V.A.), when a blood clot lodged in the circulatory system of her brain. The C.V.A. required surgery, long hospitalization and rehabilitative therapy and resulted in permanent physical injury.

From the sparse information before me at this time it appears that in 1964 little or nothing was known about potential coagulant side effects of oral contraceptives. However, from at least 1966 the medical literature and the lay press increasingly reported work which suggested a

relationship between oral contraceptives and abnormal blood clotting. Sometime between 1966 and late 1973 the Cohns became aware of the possible link between Mrs. Cohn's C.V.A. and ingestion of Enovid. They initiated suit against Searle on January 29, 1974. Their complaint, predicated on theories of negligence, breach of warranty, statutory violations and strict liability, was filed in the Superior Court of New Jersey, Law Division, Bergen County. Service was effected on Searle under the long-arm rule. On April 1, 1974 the case was removed to this court pursuant to 28 U.S.C. § 1441. Jurisdiction is vested under 28 U.S.C. § 1332.

At all times relevant to this action the plaintiffs have been residents of New Jersey. Searle is a Delaware corporation with its principal place of business in Illinois. Prior to December 30, 1960 Searle was registered to do business in New Jersey, but on that date it formally withdrew from the state. However, from 1964 to 1974, the period between Mrs. Cohn's C.V.A. and the filing of the instant complaint, Searle retained in its employ some four dozen persons known as Medical Service Representatives or "detailmen" who worked and, in most cases, resided in New Jersey. The function of these detailmen was to call on physicians to discuss Searle's pharmaceutical products.

Searle moves for summary judgment on grounds that plaintiff's cause of action is time-barred under the relevant two-year statute of limitations, N.J.S.A. 2A:14-2 (1952).[1] Searle Acknowledges that plaintiffs may have

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[1] N.J.S.A. 2A:14-2 provides:

> Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within 2 years next after the cause of any such action shall have accrued.

some relief from the strict two-year limit under the New Jersey "discovery" rule. *Fernandi* v. *Strully*, 35 N.J. 434 (1961); *Lopez* v. *Swyer*, 62 N.J. 267 (1973). Nevertheless, Searle asserts that the Cohns had reason to know of the cause of action against Searle no later than 1970, and, therefore, their claims are precluded.

Plaintiffs respond that their action is timely because the causal relationship between contraceptives and clotting was not definitively demonstrated until late 1973, and that in any case the New Jersey tolling statute, N.J.S.A. 2A:14-22 (1952),[2] deprives Searle of the statute of limitations

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[2] N.J.S.A. 2A:14-22 provides:

> If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:14-5 and 2A:14-8, or if any surety against whom there is a cause of action specified in any of the sections of article 2 of this chapter, is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said sections, or if any corporation or corporate surety not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person or surety is not residing within this state or such corporation or corporate surety is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by the section. The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation.

because Searle is a foreign corporation not represented within the state by "any person or officer" upon whom process could be served within the meaning of the tolling statute. Searle retorts that the tolling statute is inapplicable because Searle was effectively represented within the state by its detailmen, or alternatively, by virtue of the fact that from the date of the C.V.A. onward it was subject to New Jersey long-arm jurisdiction. Finally, if the tolling statute, as interpreted by the New Jersey courts, is deemed to apply to a foreign corporation amenable to long-arm service, Searle asserts that the statute as applied violates the equal protection and due process clauses of the United States Constitution. Thus, the questions presented by this motion are whether Searle is entitled to the benefit of the statute of limitations, and if so, whether the plaintiffs' action is timely upon application of the "discovery" rule even though the instant complaint was filed over nine years after the injury to Mrs. Cohn. I shall consider the statute of limitations issue here. Because I find Searle is entitled to a statute of limitations defense, I must reach the second question, but I leave it for another day.[3]

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[3] The parties are still negotiating over the terms of a submission, if necessary, on the discovery issue. In the New Jersey courts resolution of that issue would take place without a jury, *Lopez* v. *Swyer, supra,* but here jury trial exists as a matter of right. *Goodman* v. *Mead Johnson & Co.,* 534 F.2d 566 (3d Cir. 1976). I understand that the parties are willing to submit the discovery question to me on the existing written record without an evidentiary hearing and, of course, without jury trial. I am willing to accept it on that basis. However, I am informed that the defendant seeks to exact from the plaintiffs an agreement that

(Footnote continued on following page)

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At the heart of the issue of whether Searle has a statute of limitations defense is the construction and application of the tolling statute. N.J.S.A. 2A:14-22 provides in relevant part:

> If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:14-5 and 2A:14-8 . . . is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said sections, or *if any corporation . . . not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which* such person . . . is not residing within this state or *such corporation . . . is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by the section.* The person entitled to any such action may commence the same after the accrual of the cause

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any facts found as a result of such a submission of the issue be reviewed on appeal by the "clearly erroneous" standard of Rule 52(a), F.R.Civ.P., rather than to permit the Court of Appeals to review such fact determinations without the constraints of the clearly erroneous standard. *See Government of Virgin Islands v. Gereau*, 523 F.2d 140, 145-146 (3d Cir. 1975).

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> therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation.

(Emphasis supplied.) The statute exempts from its effect foreign corporations represented in the state by "any person or officer" upon whom process may be served.

It is undisputed that Searle has had no statutory or appointed agent in New Jersey at any time from the date of Mrs. Cohn's C.V.A. Nevertheless, Searle first argues that it is within the foreign corporation exception because it was represented by detailmen who are "persons or officers" within the meaning of the tolling statute. The rules pertaining to service on foreign corporations from the date of Mrs. Cohn's injuries are R.R. 4:4-4(d) (effective Sept. 3, 1958) and its successor R. 4:4-4(c)(1) (effective Sept. 8, 1969) (current version). Searle notes that under these rules jurisdiction may be obtained over a foreign corporation "by serving any servant of the corporation within this state acting in the discharge of his duties." Searle argues that the tolling statute must be construed to be consistent with the service rules during the time period relevant to this action, and since personal jurisdiction could have been obtained over Searle by serving a detailman in the discharge of his duties, representation by detailmen during the period was sufficient to stay the tolling of the statute of limitations.

Searle's argument is not persuasive for two reasons. First, Searle's proposed construction of the foreign corporation exception to the tolling statute is inconsistent with the manifest purpose of the statute itself. That enactment was intended to protect plaintiffs in New Jersey

courts[3a] by preserving their causes of action where service could not be had upon a defendant on account of absence from the state. *Lemke* v. *Bailey*, 41 N.J. 295, 303 (1963) (Schettino, J., dissenting); *Ferraro* v. *Ferro Trucking Co.*, 72 N.J.Super. 519, 524 (Law Div. 1962). Searle's detailmen operated out of their homes because Searle had no office within this state. They reported to Searle's office in Skokie, Illinois. Their function was to talk to New Jersey doctors about Searle's products to advertise them and generate good will for the company. Searle does not assert that they had any power to make contracts or place orders. Thus, the detailmen had minimal association with Searle in the public eye and had very limited authority to act on behalf of the company. It is inconceivable, in light of the purpose of the tolling statute, that the legislature intended to give the benefit of the statute of limitations to a foreign corporate defendant whose only representation within the state was by employees so invisible as these.

The second reason that Searle's rationale is not convincing is that it incorporates into the tolling statute changes in the law which were made after the act's passage. Narrowly drawn statutory language must be interpreted from the intent of the legislature in light of

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[3a] The courts of New Jersey have found that the tolling statute operates to the benefit of residents and nonresident plaintiffs whose causes of action have accrued within the state. *Goran* v. *Trade Bank & Trust Co.*, 109 N.J.Super. 271 (App. Div. 1970); *Marsh* v. *Davis*, 99 N.J.Super. 130 (Law Div. 1968). However, in a subsequent opinion which failed to mention *Goran* the Third Circuit has held that the tolling statute protects only New Jersey residents. *Zelson* v. *Thomforde*, 428 F.2d 1360 (3d Cir. 1970).

circumstances at the time of enactment. 2A *Sutherland*, Statutory Construction § 49.02 (4th Ed. 1873). "A new meaning may not be given the words of an old statute in consequence of changed conditions probably not foreseen by the Legislature." *Fidelity Deposit Co. of Maryland* v. *Abagnale*, 97 N.J.Super. 132, 143-44 (Law Div. 1967). The present tolling statute has its origins in an enactment of the Council and General Assembly of New Jersey on February 21, 1820. The foreign corporations exception was added by amendment in 1949.[4] The only legislative history relating to the 1949 amendment is the introductory statement of the bill's sponsor, Assemblyman Mackey, which provides:

> Foreign corporations licensed to do business in New Jersey are now deprived by judicial construction of the benefit of the Statute of Limitations. The purpose of this bill is to correct that situation. New York State found it necessary to make a similar change in its laws in view of recent court decisions.

The import of this statement of legislative purpose is far from unambiguous, but it sheds some illumination on the phrase "any person or officer" as used in the tolling statute.

An understanding of Mackey's introductory statement requires an analysis of the New York law to which it refers. In 1949 New York's tolling statute was C.P.A. § 19, which had most recently been amended in 1943.

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[4] Act of May 18, 1949, 1949 N.J.Laws, ch. 125 (amending N.J.R.S. 2:24-7 (1937); current version at N.J.S.A. 2A:14-22).

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Before 1943, § 19 had included an exception[5] from the tolling statute for persons or corporations with a designated agent for the service of process and foreign corporations with officers who might be served within the state. The 1943 amendment[6] to § 19 enlarged the excep-

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[5] Before 1943 C.P.A. § 19 provided in pertinent part:

> But this section does not apply while a designation made in pursuance of law of a resident of the state on whom a summons may be served for another person or corporation remains in force. Nor does this section apply while a foreign corporation has had or shall have one or more officers in the state on whom a summons for such corporation may be served.

N.Y.C.P.A. § 19 (1920), *as amended by* Act of Apr. 5, 1928, 1928 N.Y.Laws, ch. 809 (current version at N.Y.Civ.Prac.Law (McKinney) § 207 (1972)).

[6] The amendment provided in pertinent part:

> But this section does not apply in either of the following cases:
>
> 1. while a designation or appointment, voluntary or involuntary, made in pursuance of law, of a resident or nonresident person, corporation, or private or public officer on whom a summons may be served within the state for another resident or nonresident person or corporation with the same legal force and validity as if served personally on such person or corporation within the state, remains in force.
>
> 2. while a foreign corporation has had or shall have one or more officers or other persons in the state on whom a summons for such corporation may be served.

Act of Apr. 3, 1943, 1943 N.Y.Laws, ch. 263.

tion to include persons or corporations with agents for service of process designated by statute or appointment and foreign corporations with "officers or other persons" who might be served. The revision notes appended to the amendment indicate that the foreign corporation exception was broadened to include persons besides officers who were servable pursuant to C.P.A. § 229. At that time, C.P.A. § 229,[7] governing service on nonresidents engaging in business in New York State, permitted service on the person in charge of any business in which the defendant was engaged within the state. Interpreting the language of the 1943 amendment to C.P.A. § 19 in light of C.P.A. § 229, it appears that at most the amendment broadened New York's foreign corporation exemption to include companies represented within the state by statutory or appointed agents, officers or business managers. Since the New Jersey Legislature intended in 1949 to adopt a tolling exemption similar to New York's, the New Jersey Legislature could not have intended that an employee with no managerial authority, such as a detailman, could be a

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[7] C.P.A. § 229 at that time provided in pertinent part:

> When any natural person or persons not residing in this state shall engage in business in this state, in any action against such person or persons arising out of such business, the summons may be served by leaving a copy thereof with the complaint with the person who at the time of service is in charge of any business in which the defendant or defendants are engaged within this state. . . .

Act of Apr. 15, 1941, 1941 N.Y.Laws, ch. 455, *amending* N.Y.C. P.A. § 229 (1920) (repealed 1962).

representative sufficient to bring a foreign corporation out of the tolling statute.[8]

This conclusion is strengthened by reference to the law in New Jersey regarding service on foreign corporations at the time of enactment of the New Jersey foreign corporation exemption. In 1948, a year before the tolling statute amendment, the legislature amended N.J.R.S. 2:26-43 and 44[9] providing for service on corporations. Those amend-

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[8] Mackay's introductory statement to the 1949 amendment to the New Jersey tolling statute indicated that New York had amended its tolling statute in a similar fashion in response to recent court decisions. Research has disclosed no significant cases prior to 1943 regarding persons through whom a foreign corporation might be served. However, section 1 of the 1943 amendment to C.P.A. § 19, n. 5 *supra*, was adopted specifically to alter the rule of *Maguire* v. *Yellow Taxicab Corp.*, 253 A.D. 249, 1 N.Y.S.2d 749, *rehearing denied*, 253 A.D. 890, 2 N.Y.S.2d 1021, *aff'd mem.*, 278 N.Y. 576, 16 N.E.2d 110 (1938), which held that amenability to process through the Director of Motor Vehicles did not exempt a nonresident defendant from the tolling statute. These facts suggest that the New Jersey Legislature may well have intended that representation by a statutory agent within the state would be sufficient to satisfy the tolling statute's foreign corporation exemption. *Ferraro* v. *Ferro Trucking Co.*, 72 N.J.Super. 519 (Law Div. 1962). *But see, Whalen* v. *Young*, 28 N.J.Super. 543 (Law Div. 1953), *reversed on other grounds*, 15 N.J. 321 (1954); *Lackovic* v. *New England Paper Tube Co., Inc.*, 127 N.J.Super. 394 (Law Div. 1974). *Cf. Lemke* v. *Bailey, supra.*

[9] The 1948 amendment to N.J.R.S. 2:26-43 and 44 (1937) (repealed 1951) provided:

> 2:26-43. Domestic corporations in personal actions; personal or substituted service of summons.

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ments permitted acquisition of personal jurisdiction over foreign corporations by service on an officer, director, trustee, managing or general agent or agent by appointment or by law for the service of process. A detailman with minimal agency powers could not be considered a managing or general agent, nor any other individual within the statutory list. Since in 1949 personal jurisdiction over a foreign corporation could not have been obtained by serving a detailman, the legislature could not have intended an exemption from the tolling provision for an entity represented by such an employee. Searle urges that N.J.S.A. 2A:14-22 be interpreted as consistent with the rule regard-

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Service of a summons in a civil action commenced against a domestic corporation in any of the courts of this State may be made by delivering a copy thereof to an *officer, director, trustee or a managing or general agent of the corporation* personally, or by leaving a copy thereof at his dwelling house or usual place of abode with some competent member of his family of the age of fourteen years or over then residing therein, or by delivering a copy thereof to any person authorized by appointment or by law to receive service of process on behalf of the corporation, or by leaving a copy thereof at the registered office of the corporation with any person in charge thereof.

2:26-44. Foreign corporations.

Service of a summons in a civil action commenced against a foreign corporation may be made in the same manner as is provided in section 2:26-43 of the Revised Statutes for service of summons upon a domestic corporation.

Act of Sept. 10, 1948, 1948 N.J.Laws, ch. 356.

ing service of process at the time of plaintiff's injury. Such an approach would be inappropriate, however, since the reach of service was substantially expanded in 1953, *Wright* v. *News Syndicate Co., Inc.*, 35 N.J. Super. 133, 135 (Law Div. 1955), a change which the legislature could not have anticipated in 1949.

Searle next takes the position that because Searle was at all times relevant to the instant complaint amenable to long-arm service,[10] it was represented within the state within the meaning of the tolling statute. The effect of amenability to long-arm jurisdiction on N.J.S.A. 2A:14-22 is a novel question heretofore not considered by the courts.

A number of courts have considered the construction of the New Jersey tolling provisions in light of a defendant's amenability to service through the Director of Motor Vehicles under the nonresident motorist statute, N.J.S.A. 39:7-2 (1973).[11] In leading case, *Lemke* v. *Bailey, supra,* the

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[10] New Jersey does not have a long-arm statute because under the New Jersey Constitution of 1947, the Supreme Court has exclusive rule-making power over practice, procedure and administration of the courts. *Winberry* v. *Salisbury,* 5 N.J. 240 (1950). From 1963 to 1974, long-arm service was available over Searle pursuant to the court rules. R.R. 4:4-4(d) (effective Sept. 3, 1958); R. 4:4-4(c)(1) (effective Sept. 8, 1969) (current version).

[11] Holding that amenability to service through the Director of Motor Vehicles does not entitle a nonresident defendant to the benefit of the statute of limitations are *Gotheiner* v. *Lenihan,* 20 N.J.Misc. 119, 25 A.2d 430 (Sup.Ct. 1942); *Whalen* v. *Young,* 28 N.J.Super. 543 (Law Div. 1953), *rev'd on other grounds,* 15 N.J. 321 (1954); *Lemke* v. *Bailey, supra; Lackovic* v. *New England Paper Tube Co.,* 127 N.J.Super. 394 (Law Div. 1974); *Blackmon* v. *Govern,* 138 F.Supp. 884 (D.N.J. 1956). *Contra, Ferraro* v. *Ferro Trucking Co., supra.*

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New Jersey Supreme Court held that the tolling statute deprived a nonresident individual defendant of the benefit of the statute of limitations even though the defendant had been subject to service pursuant to N.J.S.A. 39:7-2. Searle argues that *Lemke* should not be considered controlling here because the Supreme Court specifically reserved the question of the effect of availability of substituted service upon a corporate defendant, and, in any case, there the court relied heavily on legislative acquiescence in, and plaintiffs' reliance on, prior court interpretation of the relationship betwen 2A:14-22 and 39:7-2, which consideration would be irrelevant to the novel question here presented. Plaintiffs urge that *Lemke* should be read broadly to hold that the statute of limitations does not run against a nonresident individual, and that *Lemke* binds the court here because there is no reason to treat individual and corporate defendants differently.[12]

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[12] Plaintiffs cite two cases for the proposition that the tolling statute deprives a nonresident defendant of a statute of limitations defense despite amenability to substituted service. *Kenny* v. *Duro-Test Corp.*, 91 F.Supp. 633 (D.N.Y. 1950); *Mann* v. *Morristown Memorial Hospital*, Civ. No. L-23529-64 (N.J.Super., Law Div., filed Aug. 6, 1965, dismissed by consent Mar. 6, 1968). Neither case supports plaintiffs' argument. *Kenny* held that under the tolling statute a foreign licensed corporation could not plead the statute of limitations despite the fact that it was servable within the state. However, the court indicated that the 1949 foreign corporation exemption was only prospective in effect and therefore inapplicable to that case. *Id.* at 635-36.

On the other hand, the facts in *Mann* do not support the reading that plaintiffs give to its result. *Mann* was a malpractice

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Amenability to long-arm service cannot be deemed to constitute representation within the state for the very same reason that the foreign corporation exemption is not triggered by the presence within the state of servants acting in the discharge of their duties. The narrow foreign corporation exception must be considered in light of legislative intent at the time of enactment. The tolling statute exemption was adopted in 1949. Although the Supreme Court had held four years earlier that the reach of state

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action against a hospital and two doctors. The plaintiff was treated by the defendants until June 1963, when his cause of action accrued. *Tortorello* v. *Reinfeld*, 6 N.J. 58, 66 (1950). He filed his complaint on Aug. 6, 1965. Summary judgment was granted to two defendants on statute of limitation grounds, but denied as to Dr. Matthews, who had moved from New Jersey in August 1963 and been served under the long-arm rule. Plaintiffs herein assert that Matthews had been subject to long-arm service from the time of his departure, and, therefore, the denial of his motion for summary judgment represents a holding that the tolling statute always applies to a nonresident defendant despite amenability to substituted service.

However, long-arm jurisdiction was not available against individual defendants until January 1964. R.R. 4:4-4(j) (effective Jan. 2, 1964) (current version at R. 4:4-4(e). Assuming that the limitations period would ordinarily run during periods of absence when subject to substituted service, the statute ran against Matthews for two months in 1963 and then re-commenced to run in January 1964. By that calculation, the complaint was filed only some seven months into the limitations period, and the action was timely without the aid of the tolling statute. Thus, the disposition of Matthews' summary judgment motion does not reflect on the relationship between the tolling statute and substituted service.

process could constitutionally extend beyond the territorial boundaries of a state, *International Shoe Co.* v. *State of Washington*, 326 U.S. 310 (1945), long-arm service was not adopted in New Jersey until 1958.[13] Further, the New Jersey courts have tended to construe the tolling statute narrowly so as not to incorporate subsequent broadening of the service laws. *See*, n. 11, *supra*. One court has held in the context of an individual defendant that amenability to long-arm service does not satisfy the tolling statute. *Fidelity Deposit Co. of Maryland* v. *Abagnale*, *supra* at 144. For these reasons, the foreign corporation section of the tolling statute cannot be construed to encompass extra-territorial service unknown to the legislature at the time of enactment and not within the intendment and scope of the statutory language.[14]

Finally, Searle argues that if the New Jersey tolling statute acts to deny the statute of limitations to a foreign corporation subject to long-arm jurisdiction, that statute violates the equal protection clause of the United States Constitution.[14a] This, too, is an issue of first impression.

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[13] Long-arm service over corporations was adopted in 1958. R.R. 4:4-4(d) (effective Sept. 3, 1958). It was extended to individuals in 1964. R.R. 4:4-4(j) (effective Jan. 2, 1964).

[14] Searle has relied on cases construing the Ohio and Idaho tolling statutes to be inapplicable to foreign corporations subject to long-arm jurisdiction. *Partis* v. *Miller Equipment Co.*, 324 F. Supp. 898 (N.D. Ohio 1970); *Lipe* v. *Javelin Tire Co., Inc.*, 96 Idaho 723, 536 P.2d 291 (1975). The tolling statutes in those states provide for tolling when a person is "absent from the state." Such general language lends itself to a broader interpretation than the more restrictive wording of the New Jersey statute.

[14a] Searle also makes a due process argument. Because of my holding of the equal protection question, I need not reach Searle's due process claim.

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Searle's position is that a statutory classification must bear a rational relationship to the purpose of the enactment to withstand an equal protection challenge. Where an out-of-state defendant is amenable to process, Searle argues that the purpose of the tolling statute is satisfied, and there is no reason to deny such a defendant the statute of limitations. While conceding that Searle is correct as to the equal protection standard, plaintiffs reply that the classification here under attack is rational because one of the purposes of the tolling statute is to penalize foreign unlicensed corporations by denying them repose to encourage domestication.[15]

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[15] Plaintiffs' position that the tolling statute was intended as a penalty to induce licensure is flawed. N.J.S.A. 14A:13-3(1) (1969) provides that a foreign corporation has no right to transact business within New Jersey without obtaining a certificate of authority from the Secretary of State. Where corporate activities do not meet the standard of "transacting business," registration is not required. *See* N.J.S.A. 14A:13-3(2); N.J.S.A. 14A:13-11 (1969); *Materials Research Corp.* v. *Metron*, 64 N.J. 74 (1973); *United States Time Corp.* v. *Grand Union Co.*, 64 N.J.Super. 39 (Ch. Div. 1960). Assuming, *arguendo*, that the tolling statute was intended to impose a penalty on unlicensed foreign corporations, such a penalty would fall with equal weight on all foreign corporate defendants without representation by persons or officers, irrespective of the nature of their New Jersey activities. Because the standard of state contacts sufficient for long-arm jurisdiction is substantially lower than that for "transacting business," *Materials Research Corp.* v. *Metron*, *supra* at 84, the sanction of the tolling statute would be imposed on corporations which would not be required to register under N.J.S.A. 14A:13-3. While there may be some justification for denying the statute of limitations to corporations transacting business without registration, the toll-

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The thrust of the equal protection clause is the proscription of arbitrary discrimination between persons similarly situated. *Schmidt* v. *Board of Adjustment of City of Newark*, 9 N.J. 405 (1952). As more fully stated by the Supreme Court,

> the Fourteenth Amendment does not deny to the States the power to treat different classes of persons in different ways. *Barbier* v. *Connolly*, 113 U.S. 27 (1885); *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61 (1911); *Railway Express Agency* v. *New York*, 336 U.S. 106 (1949); *McDonald* v. *Board of Election Commissioners*, 394 U.S. 802 (1969). The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstances shall be treated alike." *Royster Guano Co.* v. *Virginia*, 253 U.S. 412 (1920).

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ing statute would reach a far greater class of corporate defendants and, as construed by plaintiffs, that statute would itself effect an irrational classification. Further, since state licensure may not be required of a foreign corporation which is involved in the state solely in interstate commerce, *Eli Lilly & Co.* v. *Sav-On Drugs, Inc.*, 366 U.S. 276, 278 & n. 7 (1961), plaintiffs' reading of the tolling statute would run afoul of the commerce clause. I am aware of no provision imposing penalties for transacting business without a license other than N.J.S.A. 14A:13-11.

Reed v. *Reed*, 404 U.S. 71, 75-76 (1971). *Accord, N.J. Restaurant Association* v. *Holderman*, 24 N.J. 295 (1957).

As indicated, the purpose of the tolling statute is to preserve a plaintiff's cause of action where service cannot be effected upon the defendant on account of non-amenability to process. *Lemke* v. *Bailey, supra* (Schettino, J., dissenting); *Ferraro* v. *Ferro Trucking Co., supra.* Nothing in the legislative history or court construction of N.J.S.A. 2A:14-22 supports plaintiffs' assertion that a purpose of the statute is to penalize foreign unlicensed corporations to encourage licensure.[16]

The effect of the foreign corporation section of the tolling statute is to distinguish between domestic and foreign corporations subject to service through representative agents within the state and foreign corporations subject to service under the long-arm rule. The former are entitled to plead the statute of limitations while the latter are denied its repose. Since this difference in treatment bears no rational relationship to the object of the tolling statute, I find that the statute denies equal protection to foreign corporations amenable to long-arm jurisdiction.[17] *Cf.*

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[16] While the sponsor's statement regarding the 1949 amendment indicated that the legislature intended to give the benefit of the statute of limitations to foreign licensed corporations, the language of the amendment is not so narrowly phrased as to deny unlicensed corporations a statute of limitations defense.

[17] While this holding is limited to corporate defendants, individuals are subject to long-arm jurisdiction in New Jersey, R. 4:4-4(e), and I agree with plaintiffs that "[t]here is no logical

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Lemke v. *Bailey, supra* at 305-06 (Schettino, J., dissenting).

One who by law is subject to a state's jurisdiction is effectively present and represented within that state. Hurwitch v. Adams, 151 A.2d 286 (Del. Super. Ct.), *aff'd*, 52 Del. 247, 155 A.2d 591 (1959); *Bolduc* v. *Richards*, 101 N.H. 303, 142 A.2d 156 (1958); *Snyder* v. *Clune*, 15 Utah 2d 254, 390 P.2d 915 (1964). Where the long-arm rule places an out-of-state defendant on an equal footing with a resident or represented one, there is no rational justification for differential treatment of such defendants with regard to the statute of limitations. While the tolling stat-

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reason to treat corporate and individual defendants in a different manner." *Lackovic* v. *New England Paper Tube Co., Inc., supra* at 398. One court has held that it does not deny equal protection of the laws to apply a tolling statute to an individual defendant subject to substituted service pursuant to a nonresident motorist statute because of the latter statute's requirement of actual notice to the defendant for a personal judgment and the difficulty of locating an individual in another state. *Vaughn* v. *Deitz*, 430 S.W.2d 487 (Tex. 1968). However, the burdens on plaintiffs found so onerous by that court are minimized in New Jersey practice. In New Jersey, an action is commenced by filing a complaint with the court, R. 4:2-2, and a summons is to be issued and served 10 days thereafter. R. 4:4-1. However, liberal relief is granted from the 10-day service rule where the plaintiff uses due diligence to find the defendant. *See Cooke* v. *Yarrington*, 62 N.J. 123 (1973); *X-L Liquors, Inc.* v. *Taylor*, 17 N.J. 444, 454 (1955). Thus, there is no prejudice to plaintiffs in requiring them to file a complaint within the limitations period where their cause of action will be preserved so long as they make reasonable efforts to find the defendant.

ute made eminent good sense in the days of territorial restrictions on service, it has become dated in the instant context by modern changes in the law of in personam jurisdiction. The infirmity which the statute has developed in the course of the aging process is over-permissiveness: until today it allowed a plaintiff to postpone indefinitely the assertion of his cause of action even though the defendant was subject to service. As a matter of fair judicial administration, where a defendant may be brought before the courts, he should be permitted to assert the statute of limitations to implement the important policies behind that statute to spare defendants from being put to a defense after evidence is lost, memories have faded and witnesses have died or disappeared and to deliver the courts from the litigation of stale and possibly fraudulent claims. *Union City Housing Authority* v. *Commonwealth Trust Co.*, 25 N.J. 330, 335 (1957). The instant holding brings New Jersey law[18] into conformity with the rule in the majority of the states[19] that amenability to process by

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[18] I express no view on the rule of *Lemke* v. *Bailey*, *supra*, but note that any defendant subject to service under New Jersey nonresident motorist statute, N.J.S.A. 39:7-2, is also amenable to long-arm jurisdiction.

[19] Of the 42 states which have considered the question, 38 take the majority position. *See* 94 A.L.R. 485 (1935); 119 A.L.R. 859 (1939); 17 A.L.R.2d 502 (1951); 55 A.L.R.3d 1158 (1974).

Contra:

New Jersey:

Lemke v. *Bailey*, 41 N.J. 259, 196 A.2d 523 (1963).

(Footnote continued on following page)

substituted or long-arm service renders the tolling statute inapplicable.

In light of the above result, it will become necessary to resolve the second issue tendered by the motion of defendant for summary judgment—whether plaintiffs are entitled to the benefit of the "discovery" rule in bar of the statute of limitations. There will be no necessity to enter an order on the motion until that question is resolved.

Datd: March 22, 1978.

(Footnote continued from preceding page)

Ohio:

Couts v. *Rose*, 152 Ohio St. 458, 90 N.E.2d 139 (1950). However, the Ohio courts have taken a different approach to corporations. *See Partis* v. *Miller Equipment Co.*, 324 F.Supp. 898 (N.D. Ohio 1970), *aff'd*, 439 F.2d 262 (6th Cir. 1971).

S. Carolina:

Macri v. *Flaherty*, 115 F.Supp. 739 (E.D.S.C. 1953).

Texas:

Dietz v. *Vaughn*, 423 S.W.2d 113 (Civ. App. 1967), *aff'd*, 430 S.W.2d 487 (Tex. 1968).

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
Civil Action No. 74-450

SUSAN COHN and WALTER COHN, her husband,
Plaintiffs,

v.

G. D. SEARLE & COMPANY,
Defendant.

Appearances:

Walter R. Cohn, Esq.
Attorney for Plaintiffs.

Shanley & Fisher, Esqs.
Attorneys for Defendant.
By: Raymond M. Tierney, Jr., Esq.

MEANOR, District Judge.

This matter comes before the court on defendant's motion for summary judgment to dismiss the complaint. Plaintiffs, Susan Cohn and Walter Cohn, her husband and attorney, initiated suit against G. D. Searle & Com-

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pnay ("Searle"), the manufacturer of the oral contraceptive Enovid, for personal injury and *per quod* damages allegdly resulting from Mrs. Cohn's use of the drug. Mrs. Cohn commenced taking the contraceptive in the spring of 1963 and continued its use until December 22, 1963. On that date, she suffered a stroke, or cerebral vascular accident ("C.V.A."), when a blood clot lodged in the circulatory system of her brain. The C.V.A. required surgery, long hospitalization and rehabilitative therapy and resulted in permanent physical injury.

It appears that in 1964 little or nothing was known about potential coagulant side effects of oral contraceptives. However, from at least 1966 the medical literature and the lay press increasingly reported research which suggested a relationship between oral contraceptives and abnormal blood clotting. Sometime between 1966 and late 1973 the Cohns became aware of the possible link between Mrs. Cohn's C.V.A. and the ingestion of Enovid. Tr. at 58; plaintiffs' [first] brief marked in evidence Exhibit D-9 at 4-5. They initiated suit against Searle on January 29, 1974. Their complaint, predicated on theories of negligence, breach of warranty, statutory violations and strict liability, was filed in the Superior Court of New Jersey, Law Division, Essex County. Service was effected on Searle under the long-arm rule. Rule 4:4-4. On April 1, 1974, the case was removed to this court pursuant to 28 U.S.C. § 1441. Jurisdiction is invoked pursuant to 28 U.S.C. § 1332 and venue is proper under 28 U.S.C. § 1391(a).

At all times relevant to this action, the plaintiffs have been residents of New Jersey. Searle is a Delaware corporation with its principal place of business in Illinois.

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Prior to December 30, 1960, Searle was registered to do business in New Jersey, but on that date it formally withdrew from the state.

Searle first moved for summary judgment on grounds that plaintiffs' cause of action is time-barred under the relevant two-year statute of limitations, N.J.S.A. 2A:14-2 (1952).[1] On March 22, 1978, this court in a written opinion held, *inter alia,* that a foreign corporation's amenability to process by substituted or long-arm service renders the New Jersey tolling statute, N.J.S.A. 2A:14-22, inapplicable. Where a defendant could be brought before the New Jersey courts, this court reasoned, he should be permitted to assert the statute of limitations to implement the important policies behind that statute. *Cohn* v. *G. D. Searle & Co.,* 447 F. Supp. 903, 912-13 (D.N.J. 1978). In light of the result reached, this court noted that it became necessary to resolve the issue whether plaintiffs were entitled to the benefit of the "discovery" rule. *Fernandi* v. *Strully,* 35 N.J. 434, 173 A.2d 277 (1961); *Lopez* v. *Swyer,* 62 N.J. 267, 300 A.2d 563 (1973). Testimony was heard February 12, 1979 on that issue.

Plaintiffs now allege that it was not possible for them to bring suit until 1974 on account of two factors: (1) it was not until 1969-1970 that the medical evidence linking the ingestion of Enovid and the C.V.A. came to light;

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[1] 2A:14-2. 2 years; actions for injuries to person by wrongful act.

> Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within 2 years next after the cause of any such action shall have accrued.

and (2) Mrs. Cohn was experiencing a severe depression, attributable to her injury, which delayed commencement of suit until 1974.

Plaintiffs argue that the two-year statute of limitations in a medical malpractice action, N.J.S.A. 2A:14-2, begins to run not when the negligence occurred, but when the injured party knew or reasonably should have known of the injury as well as of the basis for an actionable claim. *Lopez, supra; Goodman* v. *Mead Johnson & Co.*, 434 F.2d 566 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977) (Gibbons, J.). Where one suffers a temporary disability, such as insanity, the statute is tolled for the period of the disability. N.J.S.A. 2A:14-21; *Kyle* v. *Green Acres at Verona, Inc.*, 44 N.J. 100, 207 A.2d 513 (1965). Since Mrs. Cohn's depression is a comparable disability to insanity, plaintiffs contend that the period of her disability, 1970-1973, Tr. at 58-60, tolls the statute. When the above disability subsided, plaintiffs promptly filed suit in 1974 because at that point Mrs. Cohn was fully cognizable of the basis for her claim.

Searle responds that prior to the February 12, 1979 hearing plaintiffs articulated that the delay in filing was due solely to the lack of concrete evidence linking the taking of the Enovid to Mrs. Cohn's C.V.A. Moreover, depression, defendant argues, does not fall within the meaning of disability as defined in N.J.S.A. 2A:14-21, nor was Mrs. Cohn insane as that term was defined in *Kyle, supra.*

Thus, the questions before this court are whether the lack of concrete medical evidence linking Enovid and the C.V.A. entitles plaintiffs to the benefit of the discovery

rule and, if so, whether the alleged temporary insanity of Mrs. Cohn tolls the running of N.J.S.A. 2A:14-2.

The New Jersey Supreme Court first announced the discovery rule in *Fernandi* v. *Strully, supra,* wherein the Court held that the two-year statute of limitations in a medical malpractice action began to run not when the negligence in fact occurred, but, rather, when the injured party knew or had reason to know of the presence of negligently left foreign objects in the body.[2] The rule

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[2] Early cases in New Jersey held that the two-year statute of limitations for personal injuries, N.J.S.A. 2A:14-2, in the context of medical malpractice litigation begins to run at the moment of the negligent act, irrespective of the time when the injury is discovered. While it was recognized that individual hardships would result, the courts contended that to hold otherwise "'would be inimical to the repose of society and promote litigation . . . too uncertain and too speculative to be encouraged.'" *Tortorello* v. *Reinfeld,* 6 N.J. 58, 67, 77 A.2d 240, 244 (1950); *Weinstein* v. *Blanchard,* 109 N.J.L. 332, 162 A. 601 (Ct. Err. & App. 1932).

However, in order to circumvent the strict application of the statute of limitations in this context, courts in various jurisdictions created artificial approaches such as the doctrine of continuous treatment, fraudulent concealment of injury, constructive fraud in the physician's silence, and the concept of continuing negligence. W. Prosser Handbook of the Law of Torts § 30 at 144 (4th ed. 1971). The *Fernandi* Court adopted the most direct approach, *i.e.,* the discovery rule, in response to the equitable consideration that an individual should not be denied his day in court due to blameless ignorance.

evolved beyond foreign body malpractice actions[3] to the point where the statute did not run until the plaintiff learned or reasonably should have learned of the injury and the basis for an actionable claim. *Lopez, supra,* 62 N.J. at 272; *Burd* v. *New Jersey Telephone Company,* 76 N.J. 284, 291-92 (1978).[4] The plaintiff, who contends that his discovery of a cause of action postdated defendant's actionable conduct, has the burden of proof as to the date of such discovery. *Lopez, supra,* 62 N.J. at 276; *Fox* v. *Passaic General Hospital,* 71 N.J. 122, 128 n. 1, 363 A.2d

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[3] *See, e.g., Moran* v. *Napolitano,* 71 N.J. 133, 363 A.2d 346 (1976) (discovery rule applicable to alleged misdiagnosis); *Yerzy* v. *Levine,* 57 N.J. 234, 271 A.2d 425 (1970) (discovery rule applicable to negligent performance of internal surgery where no foreign object was involved); *Diamond* v. *New Jersey Bell Tel. Co.,* 51 N.J. 594, 596-97, 242 A.2d 622, 623 (1968) (discovery rule applicable to negligent installation of conduit); *New Mkt. Poultry Farms, Inc.* v. *Fellows,* 51 N.J. 419, 420, 425, 241 A.2d 633, 636-37 (1968) (discovery rule applicable to negligently prepared survey); *Rosenau* v. *City of New Brunswick,* 51 N.J. 130, 134, 139-40, 238 A.2d 169, 171, 173-74 (1968) (discovery rule applicable to defect in water meter).

[4] In defining the discovery rule, the *Lopez* Court considered knowledge of the "basis for an actionable claim" to be a prerequisite to the running of the statute of limitations. *Id.* at 272; Burd, *supra,* 76 N.J. at 291. Because the discovery rule is defined in this manner, knowledge of the injury must necessarily be coupled with knowledge of the causal relationship between the injury and some negligent act of the defendant in order for the statute of limitations to commence running.

341, 344 n. 1 (1976).[5] Once such discovery has been established, application of the discovery rule is automatically effective, provided suit is promptly filed within two years thereafter and absent a showing of undue prejudice by defendant. *Fox, supra,* 71 N.J. at 127-28.[6]

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[5] Generally, the time of discovery in federal court is a fact question for the jury not the judge. *Goodman* v. *Mead Johnson & Co., supra.* This rule takes precedence over the state rule set forth in *Lopez* which allows the judge to make such determination. *Id.* at 573. Here, the parties expressly agreed to have the judge decide this question. Tierney Letter dated Sept. 27, 1977; Cohn Letter dated Oct. 4, 1977.

[6] The *Fox* Court held that a plaintiff who discovers the existence of a malpractice cause of action prior to the expiration of a period of two years after defendant's actionable conduct has a full two years after such discovery to bring the action absent a showing of prejudice by defendant and the lapse of a reasonable length of time within which to initiate suit. The *Fox* decision therefore mandates that the defendant be charged with a two-part showing of prejudice in order to preclude application of the discovery rule. Such ruling is a departure from *Lopez* which placed the burden of proof on the party claiming belated discovery of a cause of action. Under *Lopez,* several factors were to be considered before applying the rule: the nature of the injury, the availability of witnesses and evidence, the length of time which had elapsed, whether the delay was intentional, and the prejudice to defendant. *Id.* at 276.

The prejudice rule in *Fox,* however, may only be applicable in cases where plaintiff discovers his cause of action within two years of the alleged injury. The Court specifically reserved decision on the effect of prejudice to defendant where the cause of action is discovered later. *Id.* at 128, n. 1.

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A review of the facts here clearly demonstrates that plaintiffs are entitled to the benefits of the discovery rule. Mrs. Cohn's C.V.A. occurred in 1963 at a time when she was otherwise in perfect health. The seriousness of her subsequent injuries could not have been attributed to Enovid without concrete medical evidence.

In this regard, Mrs. Cohn was asked:

> Q. When, Mrs. Cohn did you first make any connection between your C.V.A. and Enovid?
>
> A. I'm not exactly sure, but I think it was probably the period when my older daughter was in high school.
>
> Q. Your older daughter being Nancy?
>
> A. Yes. I think it must of been that four year period along in there.
>
> Q. Could you be more specific about that?
>
> A. In fact, I'll take a pencil and paper and work backwards. That would be 1970 less four, which brings us back to 1966, so I guess it would be somewhere along in between.
>
> Q. Nancy is graduating from college this year?
>
> A. Yes.

(Footnote continued from preceding page)

In either case, evaluation of the prejudice rule requires an analysis of the *Lopez* criteria as well as plaintiff's alacrity in filing suit. Moreover, the discovery doctrine itself is subject to some restraint. As the time from the occurrence of the malpractice increases considerations of fairness to the defendant become more insistent. *Owens* v. *White*, 342 F.2d 817, 820 (9th Cir. 1965) (relied upon by *Fox* Court).

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Q. So she would of [sic, have] graduated from high school in 1970? Isn't that so?

A. Yes.

Q. So she would have been in high school between—

A. I could see my problem. I subtracted four years for high school instead of three, which would make it 1967.

Q. *Well, she would of [sic, have] been in high [school] from 1966 thru 1970? Isn't that so?*

A. *Yes.*

Q. *Was it during that period of time that you first made a connection?*

A. *There seemed to be something coming out in the papers and in the news magazines.*

Q. *At that time?*

A. *Yes.*

Q. *Is that when you first made the connection?*

A. *That's right.*

Susan Cohn Deposition, filed July 15, 1975, pp. 6-8 (Emphasis added).

Whereas her husband-attorney testified as follows:

Mr. Cohn: The first question raised to the Court this morning is when I knew of the causal connection and the possibility of a lawsuit against the defendant. I testified in depositions that in the late, latter part of 1969, the beginning of 1970, there was literature coming out among—in the press as to the possible causal connection between the ingestion of Enovid, or the birth control as such, and stroke. And I did begin collecting literature at that time. But I did not start a lawsuit until 1974.

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> As an explanation to the Court, there is no question that I did consider the lawsuit in 1970, when the literature began coming out. I discussed it with Mia, M-i-a, Parsonnette, the wife of Doctor Victor Parsonette, she being a doctor as well. I testified in depositions that I knew her from community work.
>
> She had spoken to me about it. She had suggested the possible causal connection, although she didn't encourage a lawsuit, but I then, knowing that she had some knowledge about it, had discussed it with her.
>
> Her husband performed the operation upon my wife the very first night after the stroke. I knew him, I knew her. And I was aware of the possibility of a lawsuit.

Tr. at 58.

Such concrete medical evidence did not in fact come to light until 1970 wherein the FDA finally, after extensive research, took the position that "[the] use of the oral contraceptives increases the risk of thromboembolic disorders . . . [although] data [is] inadequate to delineate differences between specific products . . . ." Defendant's Exhibit D-13; *see* Defendant's Exhibits D-14, D-15, D-16, D-17, D-18.

To link the occurrence of a C.V.A. and the ingestion of Enovid would go beyond what a reasonable man should have known in 1964. The scientific community itself was uncertain about such a link. In 1966, the FDA concluded that "[t]he most recent work on the response of blood coagulation factors to oral contraceptives indicated no statistically significant effect." Defendant's Exhibit D-17.

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Accordingly, this Court finds that the applicable date of discovery for the purposes of N.J.S.A. 2A:14-2 was in early 1970.[7]

Searle has not demonstrated any prejudice or that the delay was intentional. In light of the injuries suffered and the clear availability of witnesses and evidence, this Court, in accordance with *Lopez* and *Burd*, finds that plaintiffs

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[7] We are not faced with a fact situation analogous to *Burd, supra*. There, the claimant suffered a heart attack while working in a trench gluing together plastic pipe. He had used the glue for one week prior to the attack and had experienced dizziness in so doing. In addition, he had read the label warning him not to inhale fumes. The Court barred the action for failure to commence suit within two years of the heart attack, notwithstanding the fact it was not until one year thereafter that plaintiff was advised by counsel of a possible products liability claim. In pertinent part, Judge Conford (sitting by designation) emphasized that a cause of action is not "postponed until plaintiff learns or should learn the state of the law positing a right of recovery upon the facts already known to or reasonably known by the person." *Id.* at 292.

Here, Searle had put no one on notice of potential coagulant side effects or oral contraceptives. The FDA reports were inconclusive. Defendant's Exhibit D-17. Medical evidence did not surface until the late 1960s. Defendant's Exhibits D-13, D-14, D-15, D-16, D-17, D-18. Mrs. Cohn did not have knowledge of an actionable claim in 1963 against Searle for negligent testing or compounding or for failure to warn of known hazards. Accordingly, linking the ingestion of Enovid to the C.V.A. went beyond the knowledge of a reasonable man and possibly even the medical community.

are entitled to the benefits of the discovery rule.[8] The pertinent statute of limitations, N.J.S.A. 2A:14-2, therefore, did not begin to run until 1970.

The issue now becomes whether or not plaintiffs' suit should be barred for failure to bring the instant suit within two years of the date of discovery.

Plaintiffs allege that on or about the date of discovery Mrs. Cohn was suffering from a severe depression sufficient to constitute a disability under N.J.S.A. 2A:14-21, thereby tolling the statute of limitations.[9]

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[8] *See generally Kubrick* v. *United States*, 581 F.2d 1092, 1095-96 (3d Cir. 1978); *Exnicious* v. *United States*, 563 F.2d 418, 420 (10th Cir. 1977); *Raymond* v. *Eli Lilly & Co.*, 412 F. Supp. 1392, *aff'd*, 556 F.2d 628, 629-30 (1st Cir. 1977); *Bridgford* v. *United States*, 550 F.2d 978, 981 (4th Cir. 1977); *Reilly* v. *United States*, 513 F.2d 147, 150 (8th Cir. 1975); *Jordan* v. *United States*, 503 F.2d 620, 262 (6th Cir. 1974); *Tyminski* v. *United States*, 481 F.2d 257, 263 (3d Cir. 1973); *Toal* v. *United States*, 438 F.2d 222, 224-25 (2d Cir. 1971); *Ashley* v. *United States*, 413 F.2d 490, 492 (9th Cir. 1969); *Quinton* v. *United States*, 304 F.2d 234, 240 (5th Cir. 1962).

[9] It should be pointed out that this allegation is one of recent vintage. Prior to the hearing of Feb. 12, 1979, plaintiffs articulated to this Court that the sole reason for the lateness in filing the complaint was the result of lack of "concrete evidence linking the taking of 'Enovid' to Susan Cohn's C.V.A." Plaintiffs' [first] Brief marked in evidence Exhibit D-9, pp. 4-5.

Plaintiffs are, as of Feb. 12, 1979, arguing for the first time that Mrs. Cohn's depression (disability) prevented Mr. Cohn from discussing the lawsuit with his wife until 1974 when suit was filed.

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N.J.S.A. 2A:14-21 provides:

> If any person entitled to any of the actions or proceedings specified in sections 2A:14-1 to 2A:14-8 or sections 2A:14-16 to 2A:14-20 of this title or to a right or title of entry under section 2A:14-6 of this title is or shall be, at the time of any such cause of action or right or title accruing, under the age of 21 years, or insane, such person may commence such action or make such entry, within such time as limited by said sections, after his coming to or being of full age or of sane mind.

The statute explicitly provides for only two disabilities, infancy and incompetency. Although there are few cases which construe the toll for insanity, *Kyle, supra; Sobin* v. *M. Frisch & Sons,* 108 N.J.Super. 99, 260 A.2d 228 (App. Div. 1969), *certif. denied,* 55 N.J. 448, 262 A.2d 702 (1970), the determination of insanity requires an evaluation of all the relevant facts and circumstances, keeping in mind the manifest purpose of the tolling provision to "relieve from strict time restrictions any person who actually lacks the ability and capacity, due to mental affliction, to pursue his lawful rights." *Sobin, supra,* 108 N.J. Super. at 104.

The word insane in this statute "means such a condition of mental derangement as actually prevents the sufferer from understanding his legal rights or instituting legal action." *Kyle, supra,* 44 N.J. at 113. Such definition was broadened in *Sobin* to cover a party rendered unconscious

for a period of 100 days.[10] The above language indicates that the determination of disability should be a pragmatic one, not necessarily based upon medical or psychological classifications alone; *i.e.*, plaintiff's experts. *See Graboi* v. *Kibel*, 432 F.Supp. 572 (S.D.N.Y. 1977).

At the Feb. 12, 1979 hearing, plaintiffs put the reports of Dr. Liss, Dr. Nudelman, and Dr. Shuttleworth into evidence. All three doctors came to the similar conclusion that due to Mrs. Cohn's severe emotional depression and reaction to her physical handicap she was unable, except at a tremendous risk, to discuss her legal initiatives from 1971 to 1973. Plaintiffs' Exhibits P-3, P-4, P-6. In particular, Dr. Shuttleworth, her psychiatrist during this period, described her condition as follows:

> Finally, however, the patient [Mrs. Cohn] herself, by the end of 1971, approaching the anniversary time of the stroke, and because of the internal pressure of the depression and suicidal ideation, sought psychiatric help. After the initial session, the pa-

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[10] It is generally recognized in other jurisdictions that a person may be under the legal disability of insanity within the meaning of the exception to the statute of limitations when the disability is of such a nature as to show him unable to manage his business affairs or estate, or to comprehend his legal rights or liabilities. *See, e.g., Hurd* v. *County of Allegheny*, 39 A.D.2d 499, 502-03, 336 N.Y.S.2d 952, 956 (4th Dept. 1972); *Spearman* v. *Jones*, 226 Ga. 27, 172 S.E.2d 602 (Sup. Ct. 1970); *Klamm Shell* v. *Berg*, 165 Colo. 540, 441 P.2d 10 (Sup. Ct. 1968); *Hsu* v. *Mt. Zion Hospital*, 259 Cal. App.2d 562, 66 Cal. Rptr. 659 (Dist. Ct. App. 1968); *Emery* v. *Chesapeake & O. Ry.*, 372 Mich. 663, 127 N.W.2d 826 (Sup.Ct. 1964); *Roberts* v. *Stith*, 383 P.2d 14 (Sup. Ct. Okla. 1963); *Pearl* v. *Pearl*, 177 Cal. 303, 177 P. 845 (Sup. Ct. 1918).

> tient succumbed to her negative thinking and was hospitalized in December, 1971, because of a suicidal gesture, an overdosage with sedatives. During this hospitalization, antidepressant medication was started, and after discharge in January, 1972, active psychotherapy began.
>
> Response to treatment was sufficiently positive by 1973 so that discussion of legal action was at least possible without evasion. This timing was brought about by the psychological development of newly positive general attitudes, a more acceptant and realistic self-image, improved interpersonal skills, and an alternative life style which included new activities and teaching opportunities.
>
> In conclusion, it is my opinion that during the eight years, 1965 through 1973, pressing the issue of legal action, with its concomitant forcing of awareness and premature elimination of Mrs. Cohn's protective denial could, in view of what actually did occur in 1971, have produced a suicidal crisis with the unpredictable risk of a completed suicide.

Plaintiffs' Exhibit P-6.

In view of such medical analysis, plaintiffs assert that Mrs. Cohn's depression rises to the level of insanity set forth in *Kyle*. In addition, plaintiffs rely on *Giles* v. *Gassert*, 23 N.J. 22, 127 A.2d 161 (1956); *Giacobbe* v. *Gassert*, 29 N.J. 421, 149 A.2d 214 (1959); *Greene* v. *Director of the Division of Motor Vehicles*, 65 N.J. Super. 242, 167 A.2d 642 (App. Div.), *certif. denied*, 35 N.J. 60, 171 A.2d 146 (1961) and *White* v. *Violent Crimes Compensation Board*, 76 N.J. 368, 388 A.2d 206 (1978) for the proposition that Mrs. Cohn's disability should toll the statute.

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Plaintiffs' arguments are unpersuasive. *First*, the cases cited by plaintiffs do not deal with N.J.S.A. 2A:14-21. *Giles*, *Giacobbe*, and *Greene* were brought under the Unsatified Claim and Judgment Fund Law, N.J.S.A. 39:6-65,[11] which specifically provides for tolling of its notice claim rule in the event the would-be claimant is "physically incapable" of giving the required notice. The claimants in each of the three cases had the requisite "physical incapacity" to give notice and, thus, the notice requirements were accordingly tolled.

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[11] N.J.S.A. 39:6-65 provides in pertinent part:

> Any qualified person, or the personal representative of such person, who suffers damages resulting from bodily injury or death or damage to property arising out of the ownership, maintenance or use of a motor vehicle in this State on or after April 1, 1955, and whose damages may be satisfied in whole or in part from the fund, shall, except in cases in which the claim is asserted by actions brought under section 18 of this act pursuant to section 19 of this act, within 90 days after the accident, as a condition precedent to the right thereafter to apply for payment from the fund, give notice to the board, the form and contents of which shall be prescribed by the board, of his intention to make a claim thereon for such damages if otherwise uncollectable; provided, any such qualified person may, in lieu of giving said notice within said time, make proof to the court on the hearing of the application for the payment of a judgment (a) that he was physically incapable of giving said notice within said period and that he gave said notice within 90 days after he became physically capable to do so or in the event he did not become so capable, that a notice was given on his behalf within a reasonable period. . . .

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White involved a claim by a violent crime victim for compensation under the Criminal Injuries Compensation Act, N.J.S.A. 52:4B-1 *et seq.*, which provides that application for compensation be made within one year of the injury or death.[12] Application was in fact made beyond the one year period and rejected by the Violent Crimes Compensation Board as being out of time. In an unpublished opinion, the Appellate Division affirmed and the Supreme Court reversed.

Because of the factual circumstances concerning the crime, the injuries suffered, and "[plaintiff's] diligent pursuit of assistance," *id.* at 371, the majority, speaking through Justice Pashman, felt compelled to discard the traditional distinctions between "procedural" and "substantive" statutes of limitation and held that: "in the case of a statutorily created right, a 'substantive' limitation period may appropriately be tolled *in a particular set of circumstances if the legislative purpose underlying the statutory scheme will thereby be effectuated.*" *Id.* at 379 (emphasis added). In essence, the Court held, *inter alia*, that in appropriate circumstances, equitable considerations may affect the tolling of "substantive" statutes of limitation so long as the legislative purpose will be advanced. That has long been the rule with "procedural" statutes of limita-

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[12] In particular, N.J.S.A. 52:4B-18 provides in part:

> No order for the payment of compensation shall be made under section 10 of this act unless the application has been made within 1 year after the date of the personal injury or death, and the personal injury or death was the result of an offense listed in section 11 of this act which had been reported to the police within 3 months after its occurrence.

tion, such as N.J.S.A. 2A:14-2, involved here. It is important to note that the *White* Court stressed the purpose of the legislation—compensation to crime victims and did not perceive any legislative policy precluding a tolling because of crime-induced incapacity. *Cf. id.* at 390-91 (Conford, J., dissenting).

Thus, while *Giles*, *Giacobbe*, and *Greene* broaden the definition of physical incapacity under N.J.S.A. 39:6-65 and *White* creates an equitable exception to N.J.S.A. 52:4B-18, such cases do not advance the position taken by plaintiffs.[13]

Secondly, this Court finds that Mrs. Cohn's alleged depression does not constitute a disability under N.J.S.A. 2A:14-21 so as to toll N.J.S.A. 2A:14-2.

The mental state of a person is not something capable of precise measurement. Variations in emotional outlook are common in all people. The percentage of the population that suffers from a sufficient degree of mental or emotional disturbance to require medical treatment is substantial and would probably be greater were not psychiatric treatment so expensive. Most, however, are capable of managing their own personal affairs with a reasonable degree of success. *Graboi, supra*, 432 F.Supp. at 579.

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[13] Plaintiffs set forth additional cases which likewise are not particularly helpful to their tolling arguments. *Squires* v. *Rush*, 408 F.2d 372 (3d Cir. 1969) (per curiam) (plaintiff's alleged mental disorder did not rise to insanity under N.J.S.A. 2A:14-21 as the court specifically noted that plaintiff was neither hospitalized nor adjudicated insane). *Raymond* v. *Eli Lilly & Co.*, *supra* (discovery rule should not be rigidly limited).

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The doctors who examined and/or treated Mrs. Cohn over the past years, in particular Dr. Liss, Dr. Nudelman, and Dr. Shuttleworth, all concluded that Mrs. Cohn was so severely depressed that she was unable to institute legal proceedings until 1974.

The reports of Dr. Liss and Dr. Nudelman reveal that it was not until late 1972 or early 1973 that Mrs. Cohn could discuss her legal alternatives. Plaintiffs' Exhibits P-3, P-4. The last two reports of Dr. Shuttleworth indicate that the pressing of legal action from the years 1965 to 1973 could have produced unpredictable risks. Plaintiffs' Exhibits P-6, P-7. Such medical analysis would apparently bring Mrs. Cohn's depression within the meaning of "insanity" as defined in *Kyle*.

However, from the evidence before me, these doctors never came to such conclusions until late 1978 or 1979, long after the commencement of the instant action. For instance, the first report of Dr. Shuttleworth dated June 19, 1974 makes no mention of the severity of the depression nor whether it interfered with the patient's understanding of her legal status. Defendant's Exhibit D-6. The second and third Shuttleworth reports, which contained such conclusions, were issued subsequent to a letter from Mr. Cohn dated Sept. 12, 1978 informing Dr. Shuttleworth of the pending action and of his pertinent legal theories. *See* Tr. at 22.

At the hearing, Mr. Cohn was asked:

> Q. Up until that letter [Cohn Letter to Dr. Shuttleworth, Sept. 12, 1978] had you ever even discussed the subject of Susan's, Mrs. Cohn's emotional and psychological state as having any bearing on a lawsuit at all?

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A. You're talking about Doctor Shuttleworth?
Q. Yes, sir.
A. My best recollection is no.

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Q. I'm not talking about the case. I know you've spoke to Doctor Liss about the case and I assume you've spoken to Doctor Nudelman. The specific question, Mr. Cohn is, had you ever talked to Doctor Liss and/or Doctor Nudelman concerning your theory that the emotional or psychological involvemen tof Mrs. Cohn would somehow extend the discovery doctrine under the statute of limitations? Had you ever discussed that with them prior to that letter marked—
A. Prior to January 17th?
Q. Yes, sir.
A. Yes.
Q. When did you first discuss that situation with Doctor Liss?
A. I couldn't honestly give you a date.
Q. It was well after the commencement of this lawsuit, was it not?
A. Yes. Because the problem hadn't arisen.
Q. And your first discussion with Doctor Nudelman was also well after the institution of this lawsuit. Isn't that true?
A. Yes. If you define—well—
Q. Months?
A. Months?
Q. Months?
A. Yes.
Q. Better than a year?

A. It started I believe in—yes, the answer would be yes.

Q. Thank you.

Tr. at 22-25.

Furthermore, the doctors speak of Mrs. Cohn's barbituate incident in 1971 as a suicide attempt and conclude that any pressing of her legal action may have resulted in a complete suicide. Yet, at deposition, Mrs. Cohn testified with reference to the sleeping pill incident in 1971 as follows:

Q. Were you ever in a hospital for any reaction to drugs?

A. Yes.

Q. Tell me about that, please.

A. There was a time when I took too many sleeping pills for the middle of the day. It was five pills but I guess it's a lot for noontime. My daughter saw this empty bottle and didn't know what it was, and she called the ambulance and they hustled me up to St. Barnabas. I guess I stayed there until the drug wore off.

Q. When you took these five pills, did you realize what you were doing?

A. Yes. I was taking five sleeping pills.

Q. *With any motive in mind?*

A. *I had a terrible headache* and I wanted to get away from it. *Usually it took me five sleeping pills to go to sleep at night.*

Q. *Do you thnik that the people who saw you doing this overreacted?*

A. *Yes.* They didn't see me do it.

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> Q. Well, from whatever they found out at the time, it's your opinion that they overreacted?
> A. *Yes. I know they overreacted.* Yes.

Mrs. Cohn Dep. at 72-72 (emphasis added).

The noticeable delay in the issuance of correlating conclusions by all three doctors, in particular by Dr. Shuttleworth, as well as their description of the barbituate incident lead this Court to take a skeptical view of their accuracy. As Judge Goettel aptly pointed out in *Graboi* v. *Kibel, supra*: "[c]ertainly the Court is not required, as urged by plaintiff, to accept the conclusions of plaintiff's expert[s], retained after the commencement of litigation." 432 F.Supp. at 579.

Moreover, a brief review of the history of this litigation demonstrates that plaintiffs have noticeably shifted positions. In a previous brief filed with this Court, Mr. Cohn stated that both he and his wife "diligently endeavored to establish a concrete casual [sic, causal] link between 'Enovid' and the C.V.A. of Susan Cohn." Plaintiffs' [first] Brief marked in evidence, Exhibit D-9, p4. Plaintiff continued: "It was not until the latter portion of 1973 however that the medical evidence linking 'Enovid' to the occurrence of C.V.A. came to light. Following the strength of this evidence, suit was filed with dispatch. The delay in filing suit was due *solely* to the lack of concrete evidence." *Id.* at 5 (emphasis added). Mr. Cohn then suggested that if Searle had disclosed certain information to the public and medical profession "it is possible plaintiffs could have discovered the cause of Susan Cohn's C.V.A. prior to the latter portion of 1973." *Id.* Not one word was ever directed to this Court concerning the theory of mental disability.

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The fact Mrs. Cohn took it upon herself to establish concrete medical evidence, *id.* at 4, and brought articles linking oral contraceptives and thrombosis to her husband's attention, Mrs. Cohn Dep. at 11, is clearly inconsistent with one being unable to even understand her legal rights or to even discuss the possibility of initiating legal action.[14]

The definition of insanity as interpreted in *Kyle* is a pragmatic one, taking into consideration all relevant facts and circumstances. The New Jersey Supreme Court in *Kyle* recognized the important equitable policy behind N.J.S.A. 2A:14-21 to toll the running of the statute of limitations where a party lacks the ability and capacity, due to infancy or mental infliction, to pursue her lawful rights. However, the standard set forth in *Kyle* does not automatically encompass every mental or emotional disorder. Not all rise to the level of statutory insanity. Like physical injuries, mental afflictions can be successfully treated through counseling or medical advice. In the interim, most persons so inflicted can still manage to a fair degree of success their own affairs.

From all the evidence before me, it is clear that Mrs. Cohn was sufficiently able to manage her affairs and to collect pertinent medical information for the institution of a possible suit to redress the injuries incurred. She was able to cook, perform a number of household activities, drive a car, and otherwise lead an independent and

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[14] Such activities are, in addition, difficult to reconcile with Dr. Shuttleworth's conclusion that pressing the issue of legal action during the years 1965 to 1973 could have produced the unpredictable risk of a complete suicide. Plaintiffs' Exhibit P-6.

active life. Tr. at 27-34. In addition, she endeavored to ferret out medical evidence which might form the basis of an actionable claim. Her activities, therefore, lead this Court to believe that Mrs. Cohn was aware of, and able to deal with this cause of action.

While the medical evidence is to the contrary, this Court is not bound by said determination, *Graboi, supra,* 432 F. Supp. at 572. The circumstances of this case do not warrant a finding of disability within the meaning of N.J.S.A. 2A:14-21. As pointed out hereinbefore, plaintiffs have significantly shifted from their original position and arguments. In 1974, when suit was instituted, Mrs. Cohn's depression was never brought to this Court's attention. Now, for the first time, plaintiffs contend her depression was so severe that it rises to the level of a disability within the meaning of N.J.S.A. 2A:14-21. The fact a mental disorder of such magnitude was never before mentioned places the seriousness of such condition in considerable doubt. Moreover, only Dr. Shuttleworth's later reports coincide with the conclusions of the other doctors. In 1974, when Mrs. Cohn presumably was emerging from the critical stages of her depression, Dr. Shuttleworth, her psychiatrist during this period, made absolutely no mention of a severe emotional disability so as to preclude legal action. The foregoing facts, therefore, cast doubt upon the accuracy of the medical reports and plaintiffs' present allegations.

Moreover,, Mr. Cohn did not have to wait until 1974 before being able to discuss the suit with Mrs. Cohn. She was his wife. He knew of and could very well relate the tragic events which took place. This is not the ordinary situation where a medical malpractice plaintiff is forced to divulge the unpleasant details of unsuccessful surgery

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or medical diagnosis to an unfamiliar attorney. Rather, Mr. Cohn was (and remains) her husband. He was as familiar as she with the injuries suffered, having been married to her since 1951. Upon discovery of the coagulant effects of oral contraceptives in early 1970, suit should have been promptly initiated.

Accordingly, in view of the foregoing facts and circumstances, I find that Mrs. Cohn's alleged depression did not constitute a disability within the meaning of N.J.S.A. 2A:14-21 so as to toll the running of N.J.S.A. 2A:14-2. Defendant's summary judgment motion is granted, as the within action is time-barred under N.J.S.A. 2A:14-2.

The defendant will submit an appropriate order within 10 days.

DATED: July 26, 1979.

Judgment of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 79-1881

ROY HOPKINS

vs.

KELSEY-HAYES, INC.,

Appellant

(D. C. Civil No. 78-1646)

Nos. 79-2406 and 79-2605

SUSAN COHN and WALTER R. COHN, her husband,

Appellants in No. 79-2406

vs.

G. D. SEARLE & COMPANY,

Appellant in No. 79-2605

(D. C. Civil No. 74-0450)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Judgment of the United States Court of Appeals for the Third Circuit

PRESENT: ADAMS, VAN DUSEN AND GARTH, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the records from the United States District Court for the District of New Jersey and were argued by counsel on February 11, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed April 27, 1979 and appealed at our No. 79-1881, be, and the same is hereby affirmed, and the judgment of the said District Court filed August 6, 1979 and appealed at our Nos. 79-2406 and 79-2605, be, and the same is hereby reversed, and the causes are remanded to the particular District Court for further proceedings consistent with the opinion of this Court. Costs in each case are taxed against the respective defendant.

ATTEST:

THOMAS QUINN
Clerk

July 23, 1980

N.J. Ct. R. 4:4-4(c) (1) (The Long-Arm Rule)

4:4-4. Summons; Personal Service; In Personam Jurisdiction

Service of summons, writs and complaints shall be made as follows:

• • •

(c) Corporations, Partnerships and Associations

(1) Corporations. Upon a domestic or foreign corporation, by serving, in the manner prescribed in paragraph (a), either an officer, director, trustee, or managing or general agent; or any person authorized by appointment or by law to receive service of process on behalf of the corporation; or the person at the registered office of the corporation in charge thereof. If service cannot be made upon any of the foregoing, then, it may be upon the person at the principal place of business of the corporation in this State in charge thereof, or if there is no place of business in this State, then upon any servant of the corporation within this State acting in the discharge of his duties. If it appears by affidavit of plaintiff's attorney or of any person having knowledge of the facts that after diligent inquiry and effort personal service cannot be made upon any of the foregoing and if the corporation is a foreign corporation, then, consistent with due process of law, service may be made by mailing, by registered or certified mail, return receipt requested, a copy of the summons and complaint to a registered agent for service, or to its principal place of business, or to its registered office.

N.J. R.R. 4:4-4(d) (The Long Arm Rule)— Superceded in 1958 by N.J. Ct. R. 4:4-4(c) (1)

4:4-4. Summons: Personal Service

The summons and a copy of the complaint shall be served together. The plaintiff shall furnish the person making service with the original and a copy of the summons and as many additional copies thereof, each with a copy of the complaint annexed, as there are persons to be served. Service shall be made as follows:

• • •

(d) Upon a domestic or foreign corporation, by serving, in the manner prescribed in paragraph (a), an officer, director, trustee or a managing or general agent; or if service cannot be made upon any of the foregoing and if there is no office or place of business within this State, by serving any servant of the corporation within this State acting in the discharge of his duties; or by delivering a copy of the summonses and complaint to any person authorized by appointment or by law to receive service of process on behalf of the corporation; or by leaving a copy of the same at the registered office of the corporation with any person in charge thereof;

N.J.S.A. 2A:14-2 (The Statute of Limitations)

2A:14-2. 2 YEARS; ACTIONS FOR INJURIES TO PERSON BY WRONGFUL ACT

Every action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within 2 years next after the cause of any such action shall have accrued.

N.J.S.A. 2A:14-22 (The Tolling Statute)

2A:14-22. NONRESIDENCE OF PERSON LIABLE

If any person against whom there is any of the causes of action specified in sections 2A:14-1 to 2A:14-5 and 2A:14-8, or if any surety against whom there is a cause of action specified in any of the sections of article 2 of this chapter, is not a resident of this state when such cause of action accrues, or removes from this state after the accrual thereof and before the expiration of the times limited in said sections, or if any corporation or corporate surety not organized under the laws of this state, against whom there is such a cause of action, is not represented in this state by any person or officer upon whom summons or other original process may be served, when such cause of action accrues or at any time before the expiration of the times so limited, the time or times during which such person or surety is not residing within this state or such corporation or corporate surety is not so represented within this state shall not be computed as part of the periods of time within which such an action is required to be commenced by the section. The person entitled to any such action may commence the same after the accrual of the cause therefor, within the period of time limited therefor by said section, exclusive of such time or times of nonresidence or nonrepresentation.